90-T459

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

NO_____

CURTIS L. WRENN
P. O. Box 203
Fort Drum, NY 13603,

Petitioner.

vs

SECRETARY, DEPARTMENT OF VETERANS AFFAIRS AND CLARK C. GRANINGER, DIRECTOR, VETERANS ADMINISTRATION MEDICAL CENTER,

Respondents.

PETITIONER'S BRIEF

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

QUESTIONS PRESENTED FOR REVIEW

This is a case in which the respondents obtained dismissal of petitioner's claims at the pre-trial level. If this Court grants the petition, it will have to decide whether the rights of the petitioner were abridged by the lower courts' decions. More specifically:

1. Whether the Court of Appeals' interpretation of 29 C.F.R. subsection 1613.215(a)(7)(1990) contravenes the purpose and intent of that code.

2. Whether, pursuant to Section 5102(a) of Title 5, U.S. Code, the term "Agency", in the context of this civil action, refers to the Department of Veterans Affairs, OR to the Albany VA Medical Center.

3. Whether the petitioner was unlawfully denied procedural due process.

4. Whether the Agency violated 29 C.F.R. subsection 1613.215(a)(7)(1990) when it "cancelled" the petitioner's complaint.

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JURISDICTIONAL STATEMENT

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1), 1651 and 1915.

Jurisdiction is also invoked under the Constitution and laws of the United States, including but not limited to the Fourteenth Amendment, Title VII of the Civil Rights Act of 1964, as amended, and the Age Discrimination in Employment Act in that the decisions of the lower courts would deprive the petitioner of procedural due process and would deny him equal employment opportunity.

The jurisdiction of this Court is also invoked to review the actions of the lower courts, in that they have rendered decisions which if not reversed will contravene a Congressional intent. Also, the decisions are contrary to decisions of this Court and the other courts of appeals.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment I:

> Congress shall make no law ... abridging the freedom of speech ...; or the right of the people to peaceably ... to petition the Government for a redress of grievances.

United States Constitution, Amendment V:

> Nor shall any person ... be deprived of life, liberty, or property, without due process of law ...

United States Constitution, Amendment XIV:

> Nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

1. Petitioner submitted an application for the position of Clerk Typist, a position which the respondents had advertised that it was accepting applications from persons with his qualifications. Petitioner applied but despite his qualifications, which included typing ability in excess of seventy words per minute, he was not hired.

2. Petitioner filed a timely charge of unlawful employment discrimination against the VA in connection with the denial of employment. The EEO investigator recommended a finding of probable cause.

3. The employer's representative, Clark C. Graninger, Albany VA Medical Director, in response to the EEO investigator's recommendation, advised the petitioner on July 18, 1988 that he wanted to resolve the complaing, by among other things, an offer of "Full relief under the Back Pay Act" and a Temporary Appointment as Clerk Typist. See App E, p. 40-41, and App F.

4. The petitioner, in keeping with the EEOC's Settlement Procedures (App E, p. 47) which states in part that "Settlement requires give and take ...", responded to the employer's offer on July 21, 1988 with a counter offer. App E, p. 42-43.

5. The previously scheduled administrative hearing was unilaterally cancelled by the Administrative Law Judge on or About August 3, 1988. The hearing was cancelled despite clear instructions promulgated by the EEOC that "If no settlement is reached, the complainant is entitled to a hearing. 29 C.F.R. 1613." App E, p. 47.

6. The settlement offer made by the respondents on July 18, 1988 was "certified" on August 10, 1988. App E, p.46.

7. The respondents "cancelled" the petitioner's administrative complaint, allegedly because he rejected a certified offer of full relief.

8. The petitioner filed a complaint in the district court in which he alleged,

among other things, that: (1) the offer made on July 18, 1988 was NOT a certified offer of full relief, (2) his counter offer of July 21, 1988 was in keeping with the EEOC's guidelines of "give and take", and (3) that the offer was not certified until August 10, 1988. Thus, the "rejection" letter of July 21 could not be construed as rejecting a certified offer of full relief.

9. The district court dismissed the action at the pre-trial level, allegedly on the basis that the petitioner rejected a certified offer of full relief.

10. Petitioner filed an appeal, and the Second Circuit upheld the decision of the district court. App A.

11. Petitioner asked the court to reconsider its decision. The petition was denied. See App B and C.

REASONS FOR GRANTING WRIT

ARGUMENT I:

1. 29 C.F.R. subsection 1613.215(a)(7) (1990) provides in relevant part that an agency may cancel a complaint, "provided that the agency's Director of Equal Employment Opportunity, or a designee reporting directly to the Director, has certified in writing that the agency's written offer of relief constitutes ful relief." App A, p.9.

2. The facts in this case demonstrate the following:

a. The "offer of full relief" made on July 18, 1988 was not a "certified offer" AND more importantly the offer was not made by the "Director of Equal Employment Opportunity, or a designee reporting directly to the Director ..."

b. Clark C Graninger, realizing that he did not have authority to make a "certified offer" asked the Director of Equal Employment Opportunity to certify the offer.

c. Offer was certified on August 10, 1988. The "certified offer" was not communicated to the petitioner. He only learned of the certified offer when he obtained a response to his Freedom of Information Act request.

3. The Court is being asked to decide whether the langauge of 29 C.F.R. subsection 1613.215(a)(7)(1990) is to be given its literally meaning. That is, whether the statement "provided that the agency's Director of Equal Employment Opportunity, or a designee reporting directly to the Director, HAS (emphasis added) certified in writing that the agency's written offer of relief constitutes full relief" is to be given its literally meaning to reflect the "past tense". See page 860, Webster's II New Riverside University Dictionary, The Riverside Publishing Company:

> Past tense: A verb tense used to express an action or condition that occurred in or during the past.

4. The inescapable conclusion is that the petitioner did NOT reject a certified offer of full relief because the offer was certifed AFTER his "rejection" was made.

ARGUMENT II:

5. The Court is is being asked to decide whether the term "Agency", within the meaning of Section 5102(a) of Title 5, United States Codes refers to the Department of Veterans Administration OR the Albany VA Medical Center.

6. The lower courts decided that the petitioner rejected a certified offer of full relief which was properly made under 29 C.F.R. subsection 1613.215(a)(7)(1990).

7. The petitioner maintains that: (1) the person who made the offer did not have the authority to make such an offer nor the authority to certify such an offer of full relief, and (2) the "offer" was certified AFTER the petitioner made a counter offer.

8. The Court is being asked to decide that the term "Agency" refers to the Department of Veterans Administration and not one of its medical centers. Moreover, the Director of a medical center is not authorized to make a certified offer of full relief. Thus the decision of the lower courts that the petitioner rejected a valid certified offer of full relief is clearly erroneous, in that the decision is not supported by the facts nor the applicable statute and/or code.

ARGUMENT III:

9. This Court held in Jackson v. Metropolitan Edison Co., 419 U.S. 345, 42 L.Ed.2d 477, 483 95 S. Ct. 449 that "The Due Process Clause of the Fourteenth Amendment provides: "(N)or shall any State deprive any person of life, liberty, or property without due process of law." In that decision the Court confirmed its many earlier decisions on the subject.

10. Similarly, the Court held in Board of Regents v. Roth, 408 U.S. 564, 569-70, 92 S.Ct. 2701, 2705, 33 L.Ed.2d 548 (1972) that a person may not be deprived of liberty or property interest without due process.

11. The Court is now being asked to consider whether the aforementioned decisions and related decisions should be made to apply to the issues in this case involving a Federal agency. More specifically, whether, as in this case, when a complainant is denied an administrative hearing in connection with an offer of "full relief" (which includes property such as money compensation) does that denial constitute a denial of procedural due process. That is, does the lower courts' interpretation of 29 C.F.R. subsection 1613.215(a)(7)(1990) contravene decisions of this Court and/or the other courts of appeals.

ARGUMENT IV:

12. The Administrative Law Judge cancelled the petitioner's administrative hearing, allegedly because "Since the offer of APPARENT (emphasis added) full relief was certifed and offered... (was) rejected" (App A p 44-45). The Agency in turn cancelled the administrative complaint.

13. The Administrative Law Judge provided the petitioner with the Settlement Procedures at App A, p 47-49. The procedures clearly state "If no settlement is reached, the complainant is entitled to a hearing ..." The petitioner based his counter offer to the Agency on the basis that a hearing would be conducted and that the parties would reach some agreement under the direction of the Administrative Judge since the procedures stated "The Administrative Judge is available for consultation and advice on what might constitute "full relief..." (App A p.47).

14. The Court is respectfully asked to consider page 51 of App A where the EEOC District Director advised the petitioner on September 6, 1988 that "The one page "Settlement Procedures" sheet which was sent to you by Judge Chu, and to which you make reference in your letter, is at best perfunctory, ..." and "As to the discussion in your letter concerning a supposed "Back Pay Act," not only Judge Chu, but no one else in this office is familiar with such an "Act". Thus it appears that the petitioner was purposefully given erroneous information by the EEOC and its Administrative Law Judge. Moreover, the petitioner was denied rights and benefits BECAUSE he complied with the instructions provided him.

15. The Court of Appeals stated at page 11 App A that "Although the Back Pay Act does indeed exist, 5 U.S.C. subsection 5596 (1988), its provisions apply only to agency employees, not to job applicants such as

Wrenn. The offer thus did refer to an inapplicable statute."

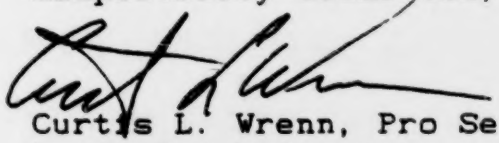
16. Despite the foregoing paragraphs 14 and 15, the lower courts decided that Wrenn had rejected a certified offer of full relief that (1) was made under an inapplicable statute, and (2) was certified AFTER a counter offer was made. Thus Wrenn was denied benefits because he did comply with the stated rules governing administrative hearings.

17. Based upon the foregoing the Court is being asked to decide that the petitioner's administrative complaint was erroneously cancelled.

CONCLUSION

Based upon the foregoing, this case should be remanded to the lower courts for trial on the merits.

Respectfully submitted,



Curtis L. Wrenn, Pro Se
P. O. Box 203
Fort Drum, NY 13603
Tel: (315) 772-7817

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PETITIONER'S APPENDIXES

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 32 August Term, 1990

(Argued: September 13, 1990 Decided: Nov 16, 1990

Docket No. 90-6089

CURTIS L. WRENN,
Plaintiff-Appellant,

v.

SECRETARY, DEPARTMENT OF VETERANS AFFAIRS AND CLARK S. GRANINGER, DIRECTOR, VETERANS ADMINISTRATION MEDICAL CENTER,
Defendants-Appellees.

Before: LUMBARD, WINTER AND MINER, Circuit Judges.

Appeal from a decision of the United States District Court for the Northern District of New York (Neal P. McCurn, Chief Judge) granting appellees' motion for summary judgment on appellant's employment discrimination complaint because appellant refused an offer of full relief during administrative proceedings.

Affirmed.

CURTIS L. WRENN, Fort Drum, New York, pro se.

BERNARD J. MALONE, JR., Assistant United States Attorney, Albany, New York (Frederick J. Scullin, Jr., United States Attorney for the Northern District of New York, Albany, New York of counsel), for Defendants-Appellees.

WINTER, Circuit Judge:

This appeal raises the question of whether an employment discrimination claimant who rejects an offer of full relief during administrative proceedings may continue to press his claims in a civil action. Plaintiff Curtis L. Wrenn appeals from Chief Judge McCurn's order granting defendants' motion for summary judgment on the ground that Wrenn had refused an offer of full relief. Because permitting actions such as Wrenn's would seriously undermine the statutory policy favoring the administrative resolution of employment discrimination complaints by means of "conciliation, conference and persuasion," 29 U.S.C. subsection 626(d) (1988); see also 42 U.S.C. subsection 2000e-5(b) (1988), and because, on these facts, the offer

of full relief effectively eliminated the factual basis for a prima facie case of disparate treatment, we affirm.

BACKGROUND

Wrenn is a sixty-year-old black male. In May 1986, Wrenn answered a newspaper advertisement for a clerk-typist position at the Veterans Administration Medical Center ("VAMC") in Albany, New York. His application contained a Personal Qualifications Statement that indicated that he was not interested in a temporary position. On June 17, the VAMC returned Wrenn's application with a letter informing him that in order to be considered for employment he must "Attain eligibility on an Office of Personnel Management list." Wrenn, not a neophyte in the area of employment discrimination claims,[1] immediately wrote the VAMC's Equal Employment Opportunity ("EEO") counselor and charged that the VAMC's proffered reason for returning his application was a pretext for race and age discrimination. Several Days later, Wrenn met with a personnel officer at

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[1]

the VAMC who, according to Wrenn, was unable to explain why the application was returned but agreed to forward it to the Office of Personnel Management for processing. On July 9, Wrenn passed a noncompetitive clerical examination and was placed on a list of seven eligible applicants for clerk-typist positions. The VAMC hired three of those on the list. Wrenn was not among the three. Those hired were substantially younger than Wrenn. At least one black. The race of the others is unknown.

In early December, Wrenn wrote to the VAMC expressing his continued interest in employment as a clerk-typist. On December 23, he renewed his charge of race and age discrimination to the EEO Counselor, and on March 17, 1987, filed a formal employment discrimination complaint with the Veterans Administration ("VA"). He sought a remedy of "immediate hire with back pay from May 1986.

The EEO investigator's report recommended a finding of discrimination. The investigator found that Wrenn had "present[ed] facts, which if unrebutted, could indicate the occurrence of

discrimination." These facts appear to be his disbelief of the VAMC's explanation for its failure to hire Wrenn. That explanation was that the advertised positions were temporary and that Wrenn's Personal Qualifications Statement indicated that he was not interested in temporary employment. However, the advertisement to which Wrenn responded did not state that fact. The EEO investigator appears to have concluded that the advertisement's failure to inform Wrenn of the temporary nature of the available positions supported a finding of discrimination.

On July 18, 1988, in an attempt to resolve his complaint and pursuant to an Equal Employment Opportunity Commission ("EEOC" or "Commission") regulation, 29 C.F.R. subsection 1613.217(a), VAMC offered Wrenn the following:

1. Clerk-Typist GS-322-4 - Temporary Appointment
2. Full relief under the Back Pay Act
3. An seniority that you may have earned.

Three days later, Wrenn refused the offer and tendered a "counter-proposal" demanding

1. Immediate hire in a position in Hospital and Health Care Administration and/or Personnel Management, in grade GS-9 or higher.

2. Full relief for the willful denial of equal employment opportunity, in violation of the Age Discrimination in Employment Act.

3. Seniority from at least May 22, 1984 on the basis of federal employment and combat services in South Vietnam.

On August 1, the VAMC transmitted to the VA Office of Equal Opportunity copies of its settlement offer and Wrenn's response, requesting that the offer be certified as full relief and the complaint be canceled. On August 10, the Office of Equal Opportunity certified that the proposed settlement constituted full relief, and on September 30, the VA notified Wrenn of its final decision to cancel his complaint.

Wrenn subsequently appealed to the EEOC. On March 17, 1989, the EEOC affirmed the cancellation of Wrenn's complaint, finding that he had rejected a properly certified offer of full relief and that his counter-proposal requested relief unrelated to his discrimination complaint. On April 3, Wrenn filed the instant complaint in the Northern District of

New York stating claims under the Equal Employment Opportunity Act of 1972, 42 U.S.C. subsection 2000e-16 (1988), and the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. subsection 633a (1988).

In a memorandum opinion dated February 13, 1990, Chief Judge McCurn concluded that the VAMC had offered Wrenn "all he was entitled to in its offer of full relief on July 18, 1988" and that the defendants were entitled to summary judgment.

DISCUSSION

Wrenn argues first that the VAMC's settlement offer was not certified as full relief until after it was made and rejected. He also raises three objections to the relief itself. First, he argues that the offer of a temporary appointment could not provide full relief for the VAMC's refusal to hire him for the advertised position because the advertisement did not indicate that the position was temporary. Second, he contends that the VAMC should have informed him of a right to receive backpay in the form of liquidated damages in the event he declined the offer of employment. Finally, he

asserts that the settlement offer was deficient because it offered "[f]ull relief under the Back Pay Act," a statute that he was unable to locate. We reject his claims and affirm.

A. The Offer of Full Relief

We agree with Chief Judge McCurn that the VAMC offered Wrenn full relief. The settlement proposal included the three basic components of "make whole" relief in hiring discrimination cases: a job offer, backpay, and retroactive seniority. See, e.g., Franks v. Bowman Transp. Co., 424 U.S. 747 (1976) (establishing presumption in favor of awarding retroactive seniority); Albemarle Paper Co., v. Moody, 422 U.S. 405 (1975) (establishing presumption in favor of awarding backpay). Wrenn's contentions to the contrary are wholly without merit.

First, the VA Office of Equal Opportunity certified that the VAMC's settlement proposal constituted full relief. although Wrenn correctly notes that the certification took place on August 10, 1988, after he had rejected the offer, the applicable regulation contains no requirement that

certification occur before an offer is made and rejected. It provides simply that the agency may cancel a complaint where the complainant has refused a settlement offer, "provided that the agency's Director of Equal Employment Opportunity, or a designee reporting directly to the Director, has certified in writing that the agency's written offer of relief constitutes full relief." 29 C.F.R. subsection 1613.215(a)(7) (1990). The district court was therefore correct to conclude that there were no issues of material fact concerning certification.

Second, Wrenn argues that the VAMC's offer of a temporary clerk-typist appointment was not full relief since the newspaper advertisement to which he responded did not describe the positions as temporary. The failure of the ad to note this fact is of no consequence, however, because it is uncontroverted that the jobs were in fact temporary. The affidavit of Kara Jordan, a VAMC Personnel Assistant, states that the available positions were temporary and that the majority of all VAMC clerical

hiring is for temporary positions. Wrenn has neither offered evidence to the contrary nor claimed that any exists. Any loss suffered as a result of discrimination, therefore, was that of a temporary position. whatever Wrenn's private expectations may have been does not undermine this conclusion because any misleading aspect of the advertisement affected all readers, without regard to race or age.

Third, Wrenn contends that the VAMC failed to inform him that he was entitled to receive an award of back pay in the form of liquidated damages in the event he declined the VAMC's offer of employment.[2] This contention appears to be that the VAMC offer was defective because it offered too much rather than too little. Wrenn's complaint, to which the VAMC's settlement offer was specifically directed, sought "immediate hire [as a clerk-typist] with back pay from May 1986." The VAMC thus offered Wrenn precisely what he requested, including backpay. At no time did Wrenn indicate that he was disposed to drop his demands for the job and retroactive

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seniority.

Fourth, Wrenn complains that by offering him "[f]ull relief under the Back Pay Act" the VAMC referred to a nonexistent statute. Although the Back Pay Act does indeed exist, 5 U.S.C. subsection 5596 (1988), its provisions apply only to agency employees, not to job applicants such as Wrenn. The offer thus did refer to an inapplicable statute. Despite this error, the disputed language communicated the VAMC's intention to offer Wrenn the backpay to which he would have been entitled if he had prevailed on his complaint. Wrenn's response to the offer neither sought clarification of the VAMC's backpay offer nor raised the issue of the applicability of the Back Pay Act. Instead, he sought an entirely different job and two years of additional and unwarranted seniority.

B. The Consequences of Refusing an Offer of Full Relief

Having determined that there were no issues of triable fact concerning whether Wrenn refused an offer of full relief, we now address the

consequences of such a refusal. Neither the district court nor the defendants have cited, nor has our research revealed, any decisions concerning whether a refusal of an offer of full relief during administrative proceedings on a discrimination claim procludes the claimant from seeking to litigate that claim.

Both Title VII and the ADEA give employment discrimination claimants the right to institute a civil action, 42 U.S.C. subsection 2000e-5(f)(1) (against private employer); 42 U.S.C. subsection 2000e-16(c) (against federal government); 29 U.S.C. subsection 633a(c) (against federal government). However, the right to bring suit under either statute is conditional.

Under Title VII, a rejected applicant for federal government employment, such as Wrenn, first must file a timely charge of discrimination with the employing agency. 42 U.S.C. subsection 2000e-16(c); 29 C.F.R. subsection 1613.214 (1990). The claimant is then authorized to file a civil action (i) within thirty days of receiving notice of a final

administrative decision on the complaint, or (ii) if, after 180 days from the date of filing a complaint with the agency or an appeal with the EEOC, there has been no administrative decision. See 42 U.S.C. subsection 2000e-16(c); 29 C.F.R subsection 1613.281 (1990). Wrenn was thus obliged to exhaust administrative proceedings before filing a civil action under Title VII.

Under the ADEA, an applicant for federal government employment ham bring suit (i) thirty days after giving notice to the EEOC of an intent to file suit, or (ii after receiving notice of a final administrative decision on a timely-filed discrimination complaint. See 29 U.S.C. subsection 633a(b)-(d); 29 C.F.R. subsection 1613.514 (1990). We believe that Wrenn, having initiated administrative proceedings on his ADEA claim, was thus obliged to exhaust such proceedings before filing a civil action under the ADEA. There is a split among the circuits on the question of whether a claimant who initiates the administrative process must pursue that process to a final agency decision.

While the Fifth and Sixth Circuits have concluded that an ADEA claimant need not exhaust his administrative remedies before filing suit, the First and Third Circuits have held that exhaustion is required. Compare Langford v. Army Corps of Engineers, 839 F.2d 1192, 1193-94 (6th Cir. 1988) (exhaustion not required), and Paterson v. Weinberger, 644 F.2d 521, 523-24 (5th Cir. 1981) (same) (in dictum) with Castro v. United States, 775 F.2d 399, 404 (1st Cir. 1985) (exhaustion required) and Purtill v. Harris, 658 F.2d 134, 138 (3d Cir. 1981) (same), cert. denied, 462 U.S. 1131 (1983). We appear never to have addressed this question. We agree with the Purtill court's reasoning that '[a]llowing a plaintiff to abandon the administrative remedies he has initiated would tend to frustrate the ability of the agency to deal with complaints." 658 F.2d at 138. Thus, Wrenn, having initiated administrative proceedings on his ADEA claim, was thus obliged to exhaust such proceedings before filing a civil action under the ADEA.

The purpose of these statutory prerequisites to

bringing a civil action -- and the well-established policy of the employment discrimination laws -- is to provide an opportunity for the resolution of discrimination complaints by means of "conciliation, conference, and persuasion." 29 U.S.C. subsection 626(d); see also 42 U.S.C. subsection 2000e-5(b). This is an important policy of the anti-discrimination laws, and the Supreme Court has accordingly stressed the legislative preference for voluntary conciliation. In Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974), the Court observed that:

> Cooperation and voluntary compliance were selected as the preferred means for achieving [the goal of assuring equal employment opportunity]. To this end, Congress created the Equal Employment Opportunity Commission and established a procedure whereby . . . the Commission . . . would have an opportunity to settle disputes through conference, conciliation, and persuasion before the aggrieved party was permitted to file a lawsuit.

Judicial elaboration of the exhaustion requirement has imposed an additional obligation of good faith participation in the administrative process on claimants who wish to bring civil

actions. See, e.g., Munoz v. Aldridge, 894 F.2d 1489, 1492 (5th Cir. 1990). A claimant thus must cooperate in the administrative investigation of the complaint by making specific charges, Edwards v. Department of the Army, 708 F.2d 1344, 1347 (8th Cir. 1983); Johnson v. Bergland, 614 F.2d 415, 417 (5th Cir. 1980), and by providing information necessary to the investigation, Jordan v. United States, 522 F.2d 1128, 1133 (8th Cir. 1975).

The purpose of the good faith participation requirement is to give the administrative process an opportunity to work and to enhance the chances of administrative resolution. It follows that a claimant who is offered full relief in the administrative process must either accept the relief offered or abandon the claim. To allow claimants such as Wrenn to continue to pursue claims that have been fully remedied during the administrative process would frustrate the congressional policy favoring administrative resolution of complaints for no discernible reason. Continued pursuit of such claims consumes judicial and other resources,

resulting in a dead-weight social los except for giving satisfaction to litigants who prefer court proceedings to administrative relief. However, litigation is not a sport in which the hunter may release a trapped quarry for the Thrill of further chase.[3]

We also believe that summary judgment is warranted on the alternative ground that the offer of full relief effectively rebutted Wrenn's prima facie case of discrimination. To establish a prima facie case, the plaintiff must prove only "that [he] applied for an available position for which [he] was qualified, but was rejected under circumstances which give rise to an inference of unlawful discrimination." Texas Dep't of Commun. Aff. v. Burdine, 450 U.S. 248, 253 (1981). Wrenn alleged that he was qualified for the clerk typist position for which he applied. He further alleged the VAMC hired younger, non-minority applicants because of an intent to discriminate against him on the basis of

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his race and age. These allegations, if proven, would establish a prima facie case of disparate treatment under Burdine. However, the VAMC's offer of full relief rebuts that showing. The present record contains no direct evidence of racial animus or of a desire to avoid older workers. Wrenn had undisputable stated to the VAMC that he was not interested in a temporary position, and the offer of full relief after he filed his claim fully substantiates the VAMC's claim of a race- and age-neutral reason for failing to hire him initially. Wrenn bore the burden of persuasion that the VAMC's explanation was pretextual. See Burdine, 450 U.s. at 253. However, Wrenn's response to the motion for summary judgment contained no evidence to rebut the VAMC's showing and, given his previous expressed disinterest in a temporary position, he could not carry that burden as a matter of law in the face of the offer of relief.

Affirmed.

FOOTNOTES

1. We cannot determine how many actions Wrenn has brought in federal courts. However, since 1985, Wrenn has been the appellant in at least forty pro se appeals in the Second, Fourth, Sixth and District of Columbia Circuits. He has been repeatedly cautioned and occasionally sanctioned for pursuing frivolous claims and appeals. His many civil rights actions led the Sixth Circuit to state:

> Wrenn;s litigiousness is alarming. He is creating a small, very specialized library of cases on civil rights litigation all by himself. In this vary case, two of Wrenn's earlier cases have been cited for the legal propositions there involved. What is more disturbing is that his multiplicitous filings waste judicial resources and the resources of the other parties involved. Wrenn's abuse of the civil rights laws to manufacture litigation is most distressing. His numerous unfounded civil rights challenges bring the noble purposes of the Civil Rights Acts into disrepute, turning attention away from the need to alleviate, and eventually eradicate, prejudice and discrimination, and focusing attention instead upon unwarranted costs and injustices that are suffered by defendants

who must mount and fund a defense
to groundless civil rights claims.

Wrenn v. Gould, 808 F.2d 493, 505 (6th Cir. 1987).

2. Wrenn relies on 29 C.F.R. subsection 1613.271(b)(1), which requires an agency that has made a finding of discrimination against a job applicant to offer that person the relevant job plus backpay, and to inform him of his right to receive only back pay should he decline the job offer. in the instant case, however, the VAMC made no formal finding of discrimination, but instead simply entered into voluntary settlement negotiations as authorized by 29 C.F.R. subsection 1613.217(a).

3. The requirement that an employment discrimination plaintiff be given a de novo adjudication in a civil action, Chandler v. Roudebush, 425 U.S. 840, 844-46 (1976), was thus fulfilled by the de novo adjudication of whether Wrenn refused an offer of full relief.

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CURTIS L. WRENN,

Plaintiff-Appellant, Docket 90-6089

VS

SECRETARY, DEPARTMENT OF VETERANS AFFAIRS AND CLARK C. GRANINGER, DIRECTOR, VETERANS ADMINISTRATION MEDICAL CENTER,

Defendants-Appellees.

PETITION FOR REHEARING AND/OR EN BANC CONSIDERATION

COMES NOW the appellant to ask the court to reconsider this decision of November 16, 1990. As grounds for his petition for rehearing the appellant respectfully submits that the court has misapprehended the facts in the case and/or misapplied the applicable laws. The appellant respectfully asks the court to consider the following:

1. The issues in this rehearing center around the court's decision of November 16 and the October 27, 1988 letter from the EEOC which states in relevant part:

"Section 1613.215(a)(7) which requires federal agencies to cancel a complaint when the complainant refuses, within 15 calendar days of receipt of an offer of settlement, to accept an agency offer of full relief in adjustment of the complaint, provided that the agency, Director of EEO, of a designee reporting directly to the agency's Director of EEO, has certified in writing that the agency's offer of full relief is the appropriate relief in Section 1613.271."

The letter is incorporated herein as Exhibit 1.

2. The court correctly noted that the settlement offer was made on July 18, 1988 by the Medical Center Director. The court apparently overlooked one important fact. The offer WAS NOT made by "the agency's (The Department of Veterans Affairs) Director of EEO." All of the facts and/or evidence submitted in this case repeatedly refer to the fact that the offer was made by the "Medical Center Director (EEO Officer" (page one of Exhibit 2) and not the "agency Director of EEO" as the law

requires. Also, Appellee Graninger apparently recognized that he did not have authority to certify an offer so he on August 1, 1988 asked the Director (of EEO) to certify his (Graninger) offer. See Exhibit 3.

3. The court apparently did not consider that the requirement is that offer had to be certified either at the time of the offer OR prior to the offer. In this case the offer was made on July 18, 1988 and the offer was apparently certified on August 10, 1988. That is, the law and the evidence in this case point to one inescapable conclusion. And that is, the agency may cancel the complaint "provided that the agency's Director of EEO, ... has certified in writing ..." It is inconceivable how anyone, especially this court, can hold, based upon the facts in this case, that a certified offer of full relief was made on July 18, 1988 by the agency's Director of EEO. That is to say, this case turns on an example of contract law - an offer and acceptance. If there is no offer, there can be no rejection. More specifically, Appellee Graninger

did not make an offer NOR did he have the authority to do so. Also, the agency's Director of EEO made a certified offer AFTER the reputed offer was rejected.

4. In summary, the appellant submits that the court should have noted and applied the following facts in rendering its decision on November 16:

a. Appellee Graninger was not the agency's Director of EEO, and therefore could not have made an offer of full relief. Even if we accept for the sake of argument that he could make an offer, he could not, by law as interpreted by this court, certify the offer.

b. The offer to the appellee was not a certified offer, in that contrary to Administrative Judge Chu the Director of EEO certified the offer On August 10, 1988, in response to Appellee Graninger's request. See Exhibit 3.

c. The appellant DID NOT reject a certified offer of full relief from the agency's Director of EEO because such was never made. The appellant was not aware of the certification until he received the

Memorandum of August 10, 1988 in response to his FOIA request.

d. Although the court apparently raised the question concerning whether the offer of full relief had to be certified at the time of the offer, its decision does not reflect the language of 29 CFR Section 1613.215(a)(?) which clearly states "has certified in writing" which rationally cannot be read in ANY manner other than an act which has ALREADY been consummated.

WHEREFORE, the appellant prays that the court will reconsider its decision, and remand this case to the district court for a proper hearing.

Respectfully submitted,

/s/Curtis L. Wrenn, Pro Se
P.O. Box 203
Fort Drum, NY 13603
Tel: (315) 772-7817

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was mailed to the US Attorney, US Courthouse, Albany, NY 12207, 28 November 1990.

/s/Curtis L. Wrenn

APPENDIX C
Page 1 of 2 Pages

United States Court of Appeals
for the
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the Third day of January, on thousand nine hundred and ninety.

CURTIS L. WRENN,

Plaintiff-Appellant,

-v-

SECRETARY, DEPARTMENT OF VETERANS AFFAIRS AND CLARK C. GRANINGER, DIRECTOR, VETERANS ADMINISTRATION MEDICAL CENTER,

Defendants-Appellees.

Docket Number
90-6089

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by CURTIS L. WRENN, Pro Se.

Upon consideration by the panel that decided

the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ELAINE B. GOLDSMITH
Clerk

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----------x

CURTIS L. WRENN, :

Plaintiff-Appellant :

-against- : Docket No. 90-6089

SECRETARY, DEPT. OF VETERANS AFFAIRS AND CLARK C. GRANINGER, DIRECTOR, VETERANS ADMINISTRATION MEDICAL CENTER, :

Defendants-Appellees.

----------x

September 13, 1990
10:30 A.M.

Courtroom #1705
United States Courthouse
40 Foley Square
New York, New York

BEFORE:

HON. RALPH K. WINTER
HON. J. EDWARD LUMBARD
HON. ROGER J. MINER

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A P P E A R A N C E S :

CURTIS L. WRENN, Pro Se
Post Office Box 203
Fort Drum, New York 13603

BERNARD J. MALONE, JR., ESQ.
Assistant United States Attorney
Attorney for Defendants
James T. Foley U.S. Courthouse
Albany, New York 12207

JUDGE WINTER: We will hear counsel, Mr. Wrenn.

MR. WRENN: Good morning, Your Honor.

If it please the Court, the case before you involves two primary issues.

One, whether or not the employer discriminated against the plaintiff; and

Two, whether or not the employer offered a bona fide settlement.

I submit for the Court's consideration that there was discrimination found by the EEO investigator.

Also, I invite the Court's attention to Page 12 and page 30 of the brief.

Those two pages I submit to you do not reflect an offer of full relief on the part of the employer.

At Page 12, the plaintiff was offered a temporary position as a clerk-typist when, in fact, he applied for a permanent type of position.

At Page 12, the employer offered full relief under the Back Pay Ace.

In communication with the EEOC, and in communication with the library, the plaintiff was not able to find any such statutory act.

The EEOC asked the plaintiff to go back to the V.A. so that they could clarify what they meant by full relief under the Back Pay Ace.

So I submit to the Court that no offer was made because no such statute existed.

The EEOC does not have such a statute nor does such a statute exist in the library.

This case is related to a history of a custom and practice of which the plaintiff over a period of twenty years had applied for and been denied employment by the Veterans Administration.

It started in 1970 and is still going on.

The plaintiff has been denied every position that he has applied for from GS-4 to GS-15.

At this point I will stop and use my remaining time for rebuttal.

MR. MALONE: May it please the Court, it is correct that as Mr. Wrenn stated there was a

finding or a recommendation by the EEOC investigator that there was a preponderance of evidence in the case that there had been discrimination.

However, that conclusion has no bearing on this lawsuit or in this case.

There never was a finding by either the EEOC or by the agency involved, the Veterans Administration, that there has been discrimination in this case.

The position that Mr. Wrenn has applied for -- although the advertisement didn't say so -- indicates it was a temporary clerk-typist position.

Shortly after he applied in writing, it appeared to have been a mistake, and the submitted application was returned to him.

Two days -- strike that -- one day thereafter, he wrote back indicating that he was filing a complaint based upon race, age and discrimination.

The position which he, in fact, applied for was a temporary job.

It was, in fact, given to a black male, albeit someone who was quite a bit younger than this individual.

JUDGE LUMBARD: What about the position of summary judgment?

MR. MALONE: The District Court issued summary judgment on the ground that after the agency was -- the agency and the complainant were notified, there is going to be a hearing in this case to determine whether or not there was either age or race discrimination or both, the agency notified the complainant in writing that they were offering him a position, which had been advertised, therefore which he had applied together with back pay.

The individual, the complainant, Mr. Wrenn, rejected that.

Now while Mr. Wrenn has stated in his papers that there was no inclusion by the -- no inclusion -- that the offer of full relief was in fact an offer of full relief, there was shortly after that a finding by EEOC or a finding by the

agency that there was an offer of full relief.

Based upon that, EEOC dismissed the complaint.

JUDGE WINTER: Does that mean he gets no relief whatsoever now?

MR. MALONE: Your Honor, the law provides that the only way in which he is entitled to back pay is if there had been a finding by either the agency or EEOC that there has been discrimination.

That did not occur here.

He was offered back pay, but that offer under the law does not bind the V.A. to give him what I think amounts to two years of back pay.

They offered him the job plus back pay as they find that was all he was entitled to.

JUDGE WINTER: I don't understand.

They offered him pack pay or they didn't offer him back pay?

MR. MALONE: No, they did offer him back pay as part of the settlement, but it was not a back pay offer pursuant to a finding by either the

agency or EEOC that there had been discrimination.

JUDGE WINTER: Okay.

MR. MALONE: Instead of going through a hearing, the agency elected to do that.

JUDGE WINTER: I am not sure.

You say that wasn't binding?

MR. MALONE: Once they made an offer to him, they did not have to, under the law, give him the back pay if he rejected the position.

JUDGE WINTER: If he rejected the position?

MR. MALONE: Yes, sir.

JUDGE LUMBARD: The regulation says: If the agency cancels the complaint and if an offer is made and rejected.

And that had to be an offer of full relief.

So the contention here is that the offer was made and rejected.

Is that right?

MR. MALONE: That the offer was an offer of full relief and was rejected.

JUDGE LUMBARD: Now the same regulation allows, after the cancellation of the complaint, allows the complainant to appeal to the Commission or to file a civil suit.

MR. MALONE: He chose the latter.

JUDGE LUMBARD: He chose the latter.

What was the issue before the District judge?

MR. MALONE: There were a number of arguments both made.

One was that --

JUDGE LUMBARD: No, under the regulations.

See if you agree with me.

I think under the regulations the only thing that the District judge can examine is whether, in fact, an offer of full relief has been made.

Is that right?

MR. MALONE: I would agree with that.

JUDGE LUMBARD: And once the offer has been made, then the judge has no alternative but

to affirm the cancellation of the complaint.

Is that it?

MR. MALONE: I would take that position; yes, sir.

I would think that Judge McKearne"s (phonetic) decision clearly, readily indicates that he did find it was an offer of full relief.

JUDGE WINTER: Thank you.

You are excused.

Mr. Wrenn, you have a minute.

MR. WRENN: If the Court will look at Page 12, you will see that the employer did not comply with the regulations.

That is, there is no offer of full relief certified by the EEOC Director.

There was an offer of full relief under the Back Pay Act.

What that means, the Court has not said.

EEOC says: No such act exists.

So I again submit that no offer was made, no offer of pay was made.

There is no mention of back pay.

It says full relief under the Back Pay Act without saying what that means.

The other point is this.

If the Court will look at the advertisement, there is no mentioning of this position being temporary until after the plaintiff filed his charge of discrimination, then the employer says the position is temporary -- at no other time.

The plaintiff mentioned it to the Personnel Director, and contrary to the application, discussed it with the Personnel Director, that there is no comment whatsoever that the position was temporary.

Thank you for your time.

JUDGE WINTER: Thank you, Mr. Wrenn.

We will reserve decision.

(Whereupon, the hearing was concluded at 10:45 A.M.)

* * *

I hereby state that the above is a full and accurate transcript of the minutes of this hearing, to the best of my ability.

/s/CLARENCE EDWARD PARKER, Reporter

Albany, New York 12208

Veterans
Administration

July 18, 1988

In Reply Refer To:

500/00

Mr. Curtis Wrenn
R.D. #1, Box 218
Nassau, N.Y. 12123

Dear Mr. Wrenn:

We have been notified of a hearing before the Equal Employment Opportunity Commission in August, 1988. In order to resolve your complaint, we would like to offer you full relief which includes the following:

1. Clerk Typist GS-322-4 - Temporary Appointment
2. Full relief under the Back Pay Act
3. Any seniority that you may have earned.

You have fifteen (15) calendar days upon receipt of this letter to respond to this request. If you do not respond within this period of time, we will

assume that you have declined this offer.

I look forward to hearing from you.

sincerely,

/s/Clark C. Graninger

Director

CURTIS L. WRENN

P.O. BOX 1691

ALBANY, NY 12201

Telephone:

(518)477-2508

July 21, 1988

Clark C. Graninger, Director
Veterans Administration
113 Holland Avenue
Albany, NY 12208

RE: Wrenn v. VAMC (500/00)

Dear Mr. Graninger:

Thank you for your letter of July 18, 1988, a copy of which is enclosed.

In response to your letter please be advised that your offer of "full relief" as presented is NOT accepted. Please accept my counter proposal which follows:

1. Immediate hire in a position in Hospital and Health Care Administration and/or Personnel Management, in grade GS-9 or higher.

2. Full relief for the willful denial of equal employment opportunity, in violation of the Age Discrimination in Employment Act.

3. Seniority from at least May 22, 1984 on the basis of federal employment and combat services in South Vietnam.

Thank you for considering my counter proposal. Please feel free to contact me should you have questions or if you would like to discuss my proposal.

Very truly yours,

/s/Curtis L. Wrenn

CERTIFIED MAIL P713962718

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
NEW YORK DISTRICT OFFICE
U.S. CUSTOMS HOUSE
6 WORLD TRADE CENTER, RM 600
NEW YORK, NEW YORK 10048

August 3, 1988

Office of General Counsel (024)
Veterans Administration
Central Office
810 Vermont Avenue, N.W.
Washington, D.C. 20420

Re: Employment Discrimination Complaint of Curtis L. WRENN
E.E.O.C. Complaint No. 160-088-X-0135
Agency File No. 87-763

Dear Sir/Madam:

Enclosed, please find the complaint and investigative file in the above referenced matter. Pursuant to 29 C.F.R. 1613.215, the complaint herein is returned for a determination by the Agency head or designee to reject or cancel said complaint. On 18 July 1988, the Albany VA Medical Director, Clark C. Graninger proposed to resolve the complaint with full relief. The offer was rejected by the Complainant on 21 July. Please see, enclosed letter dated 18 July to Mr. Curtis Wrenn and his response. Since the offer of apparent full relief was

certified and offered by Dr. Graninger pursuant to 29 C.F.R. 1613.215(7) in his capacity as the facility's EEOC Director and subsequently rejected by the Complainant, the Agency ..."shall reject or cancel a complain" in such instances. 29 C.F.R. 1613.215(a).

Please inform this office as to the action that will be taken in this matter.

Sincerely,

/s/Kenneth W. Chu
Administrative Judge

cc: Wrenn;
Graninger

Veterans
Administration

Memorandum

Date: Aug 10 1989

From: Office of Equal Opportunity (06)

Subj: Discrimination Complaint - Curtis Wrenn, OEO No. 87-763

To: General Counsel (024)

I certify that the settlement proposed to the subject complainant constitutes full relief. accordingly, I request that the complaint be cancelled.

/s/Gerald K. Hinch

SETTLEMENT PROCEDURES

Voluntary settlements are authorized and encouraged by the Commission's regulations, 29 C.F.R. 1613.217. A settlement can provide all appropriate remedies, without a finding of "fault" on either side; settlement agreements do not constitute an admission of wrong-doing by the Agency or by any Agency employee.

The Agency Representative should have authority to negotiate and sign a binding settlement agreement. Both parties should be prepared to discuss settlement during the pre-hearing conference.

If no settlement is reached, the complainant is entitled to a hearing. 29 C.F.R. 1613. Settlement requires give and take and flexibility in considering the other side's position. Although not necessarily providing for everything desired by the parties, a settlement can provide a solution which is satisfactory to both sides.

The Administrative Judge is available for consultation and advice on what might constitute "full relief" where the Complainant to prevail on

all issues; thereby focusing settlement discussion. Where no settlement is reached and the matter goes to hearing, the recommended decision of the Administrative Judge will be rendered in conformity with Federal discrimination law. Certain burdens of proof are placed on each party.

The Complainant must present a prima facie case; that is facts which if unrebutted, would convince a reasonable person that illegal discrimination, more likely than not, had precipitated the Agency's actions. The Agency is then afforded the opportunity of articulating its legitimate, non-discriminatory reasons for the actions taken. With that burden met, the Complainant must establish by a preponderance of the evidence that the Agency's reasons were mere pretext, to mask discrimination. Thereafter the Agency must establish, by clear and convincing evidence, that even absent discrimination, the Complaint would not have gotten the remedy sought. Other burdens are placed on the parties in cases alleging age and handicap discrimination. SEE: McDonnell Douglas Corp. v.

Green, 411 U.S. 792 (1973); Texas Dept. of Communit Affairs v. Burdine, 450 U.S. 248 (1948); Day v. Mathews, 530 F.2d 1083; Griggs v. Duke Power Co., 401 U.S. 424 (1971); Prewitt v. U.S. Postal Service, 662 F.2d 307; Loeb v. Textron, 600 F.2d 1003; and 29 Code of Federal Regulation (C.F.R.) 1613 et seq.

The Agency should understand that the hearing process is costly, both in monetary and human terms and that an amicable settlement may provide a more expeditions means of resolution.

The Complainant should understand that if the matter does go to a hearing, a decision will be based on the entire file and hearing testimony. The possibility exists that the Complainant may not prevail. If the Agency is willing to discuss a settlement and to offer an appropriate remedy, serious consideration should be given to the offer, before proceeding to the hearing.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
NEW YORK DISTRICT OFFICE
90 CHURCH STREET. ROOM 1501
NEW YORK, NEW YORK 10048

September 6, 1988

Mr. Curtis L. Wrenn
P.O. Box 1691
Albany, New York 12201

RE: Wrenn Vs. VA
Charge No. 160-088-X-0135

Dear Mr. Wrenn:

This is in response to your letter of August 18, last, relative to the actions of Administrative Judge Kenneth W. Chu with respect to the above-captioned matter.

The August 3, 1988 letter from Judge Chu to the Veterans Administrations Office of General Counsel, a copy of which was sent to you, was intended to--among other things--make known to the parties that the hearing scheduled in the matter for August 18 was not going to be held. Specifically, the second sentence of the first paragraph of such letter clearly infers this fact. That same sentence also addresses your statements that "there is no

indication that the case was remanded to the VA" and that "there was no indication that (Judge Chu) had transferred jurisdiction to the (VA)/or its legal counsel."

The one page "Settlement Procedures" sheet which was sent to you by Judge Chu, and to which you make reference in your letter, is at best perfunctory, and certainly not intended to anticipate everything which might happen once a matter is scheduled for hearing. In the instant situation, Judge Chu concluded that, during settlement efforts, you were offered "full relief" and rejected such offer. Therefore, agency guidelines left him no alternative other than to remand the matter back to the VA for its rejection or cancellation of your complaint, and this was done.

As to the discussion in you letter concerning a supposed "Back Pay Act," not only Judge Chu, but no one else in this office is familiar with such an "Act." In view of this, and the fact that it was the VA which mentioned it, I would agree with the Judge that it is that agency to which queries

concerning the "Act" should be addressed.

In sum, I am convinced that Judge Chu's actions in this matter were completely proper, and consistent with the Laws which we administer as well as with agency practice and procedure, when he remanded the subject matter back to the charged agency for action by it, upon establishing to his satisfaction that full relief was offered and rejected. Therefore, no further action will be taken by this Office in this matter.

Sincerely,

/s/Edward Mercado
District Director

EM:mo

APPENDIX F



CLERK TYPIST

Immediate vacancies exist at the Albany VA Medical Center for 2 clerk typist positions.

Applicants are required to type a minimum of 40 wpm.

Medical terminology preferred.

For further information contact:

V.A. MEDICAL CENTER
113 Holland Ave., Albany
Personnel Office, Room 106B
(518) 462-3311, Ext. 204

EOE
English language proficiency required by PL95-201

90-1459

FILED
APR 18 1991
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

NO_____

CURTIS L. WRENN
P. O. Box 203
Fort Drum, NY 13603.

Petitioner.

vs /

SECRETARY, DEPARTMENT OF VETERANS AFFAIRS AND CLARK C. GRANINGER, DIRECTOR, VETERANS ADMINISTRATION MEDICAL CENTER,

Respondents.

SUPPLEMENTAL

PETITIONER'S APPENDIXES

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BEST AVAILABLE COPY

LIST OF PETITIONER'S APPENDIXES

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"CORRECTED COPY"

APPENDIX C
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United States Court of Appeals
for the
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the Third day of January, on thousand nine hundred and ninety-one.

CURTIS L. WRENN,

Plaintiff-Appellant,

-v-

SECRETARY, DEPARTMENT OF VETERANS AFFAIRS AND CLARK C. GRANINGER, DIRECTOR, VETERANS ADMINISTRATION MEDICAL CENTER,

Defendants-Appellees.

Docket Number 90-6089

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by CURTIS L. WRENN, Pro Se.

Upon consideration by the panel that decided

the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ELAINE B. GOLDSMITH
Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

CURTIS L. WRENN,

Plaintiff,

-v-

SECRETARY, DEPARTMENT OF VETERANS AFFAIRS and CLARK C. GRANIGER, Director of the Veterans Administration Medical Center,

89-CV-374

Defendants.

APPEARANCES: OF COUNSEL:

CURTIS L. WRENN
Plaintiff, Pro Se
P. O. Box 203
Fort Drum, NY 13603

FREDERICK J. SCULLIN, JR.
United States Attorney
James Foley U. S. Courthouse
Broadway
Albany, NY 12201

BERNARD J. MALONE, JR.
Assistant U.S. Atty

NEAL P. McCURN, C.J.

MEMORANDUM-DECISION AND ORDER

Plaintiff Curtis L. Wrenn ("Wrenn") has

sued the Secretary of the Department of Veterans Affairs and Clark C. Graniger, Director of the Veterans Administration Medical Center, alleging that the defendants have discriminated against Wrenn on the basis of plaintiff's age and/or race. The defendants bring this motion, seeking dismissal of plaintiff's complaint, or, in the alternative, summary judgment. For the reasons stated below, defendant's motion for summary judgment is granted.

Background

Curtis Wrenn applied for the position of temporary clerk-typist with the Veterans Administration Medical Center ("V.A.M.C.") on or about May 12, 1986. He alleges that he was denied this position because of his race and/or age. As a result of this denial, the plaintiff filed a complaint against the Veterans Administration ("V.A.") with the Equal Employment Opportunity Commission ("E.E.O.C." or "Commission") on March 21, 1987.

On July 18, 1988, the V.A., in an attempt

to settle this dispute, offered Wrenn what the E.E.O.C. terms "full relief" concerning Wrenn's complaint. The director offered Wrenn the following relief:

> a. Clerk-Typist GS-322-4 Temporary Appointment;
> b. Full relief under the Back Pay Act; and
> c. Any seniority that [Wrenn] may have earned.[1]

Two days later, Mr. Wrenn responded to this offer by stating:

> 1. Immediate hire in a position in Hospital and Health Care Administration and/or Personnel Management, in grade GS-9 or higher.
>
> 2. Full relief for the willful denial of equal employment opportunity, in violation of the Age Discrimination in Employment Act.
>
> 3. Seniority from at least May 22, 1984 on the basis of federal employment and combat services in South Vietnam.

---

[1] This settlement offer by the V.A. was officially certified as an offer of full relief on August 10, 1988, by Gerald K. Hinch, General Counsel, Office of Equal Opportunity.

(emphasis in original).

The V.A. and the E.E.O.C. have both determined that this counter-offer includes terms unrelated to Wrenn's complaint. For example, the V.A.M.C. was seeking a temporary clerk-typist position, GS-322-4; yet plaintiff's counter-offer was for a position in Health Care Administration or Hospital Management, in a grade GS-9 or higher. Additionally, plaintiff's counter-offer sought seniority relating to plaintiff's combat services in Vietnam, however such service would clearly be irrelevant in computing any seniority Wrenn would have been entitled to concerning the clerk-typist position for which Wrenn had applied.

As a result of Wrenn's rejection of the offer of full relief, the E.E.O.C., pursuant to 29 C.F.R. Subsection 1613.215, cancelled the discrimination claim Wrenn had filed with the Commission. This section states, in pertinent part:

> (a) The agency head or designee shall reject or cancel a complaint:
> ***
> (7) If the complainant

> refuses within 15 calendar days of receipt of an offer of settlement to accept an agency offer of full relief in adjustment of the complaint, provided that the agency's Director of Equal Employment Opportunity...has certified in writing that the agency's written offer of relief constitutes full relief...

29 C.F.R. subsection 1613.215(a)(7).

Wrenn did not appeal this cancelation, as he could have pursuant to 29 C.F.R. subsection 1613.231(a)(1). However, subsequent to the filing of this judicial complaint, the plaintiff filed a request to reopen the previous E.E.O.C. decision, pursuant to 29 C.F.R. subsection 1613.235(b). On July 12, 1989, the E.E.O.C. declined this request, stating:

> [I]n the present case, the record indicates that appellant filed a civil action on april 3, 1989, concerning the agency's alleged discriminatory failure to select him for the temporary position of clerk-typist, GS-4. Therefore, the Commission finds that neither the agency nor the Commission has

> jurisdiction to decide the matter included in the civil action. Concomitantly, the issue of the propriety of the agency's cancellation of this matter is no longer a determinable issue since the matter is not amendable to further administrative processing due to lack of jurisdiction.

The defendants moved to dismiss plaintiff's claim on the grounds that this court does not have subject matter jurisdiction over Wrenn's complaint. They also move, in the alternative, for summary judgment on plaintiff's complaint.

Wrenn opposes said motion, and at oral argument on October 10, 1989, plaintiff argued that, upon not being hired by the V.A.M.C., he was entitled to an award of a sum of money equal to the backpay he would have received from the date he would have been appointed to the position absent discrimination, until the date the defendants offered Wrenn the position, pursuant to 29 C.F.R. subsection 1613.271 (b)(1).

Discussion

Wrenn's claim for relief is based upon 42

U.S.C. subsection 2000e-16(c), and 29 U.S.C. subsection 621 et seq. These statutes require plaintiffs who allege discrimination in employment to exhaust administrative remedies before filing an action with a district court.

Thus, in Rivera v. United States Postal Office 830 F.2d 1037 (9th Cir. 1987), cert. denied __ U.S. __, 108 S.Ct. 1737 (1988), reh'g denied __ U.S. _, 108 S.Ct. 2888 (1988), the court held that the plaintiff's failure to exhaust administrative remedies required dismissal of his age discrimination claims. Id. at 1039. Similarly, in Sims v. Heckler 725 F.2d 1143 (7th Cir. 1984), the Seventh Circuit affirmed the district court's dismissal of plaintiff's employment discrimination claim for lack of subject matter jurisdiction, due to plaintiff's failure to exhaust administrative remedies. Id. at 1146 (citations omitted).

The defendants argue that since the plaintiff commenced this civil action before the E.E.O.C. had declined to reopen Wrenn's E.E.O.C.

complaint, this district court does not have jurisdiction over plaintiff's claim, since it was filed before Wrenn exhausted his administrative remedies. This contention is unpersuasive.

In this case, Wrenn filed the instant lawsuit on April 3, 1989, several months before the E.E.O.C. declined to reopen his case on July 12, 1989. While it is true that, at the time the lawsuit was filed, Wrenn's administrative remedies were not exhausted, it is equally true that, at the present time, Wrenn has, in fact, exhausted his administrative remedies. Indeed, the reason the Commission provided for not reopening Wrenn's E.E.O.C. complaint was because it found that this court, and not the Commission, had jurisdiction over Wrenn's complaint.

The defendants alternatively claim that the plaintiff failed to exhaust his administrative remedies because his complaint was properly stricken by the E.E.O.C. pursuant to 29 C.F.R. subsection 1613.215 (a)(7). This argument, too, is unsound.

While the plaintiff could have appealed the agency's decision to cancel his complaint, pursuant to 29 C.F.R. subsection 1613.231 (a)(1), this appeal was not required. This is demonstrated by the fact that when the Commission notified Wrenn of the E.E.O.C.'s decision to cancel Wrenn's complaint, the Commission informed Wrenn that he could file a suit in district court, based upon the defendants' alleged discriminatory conduct.[2]

To hold today that this court does not have jurisdiction over Wrenn's complaint would arguably leave the plaintiff without any remedy, since the E.E.O.C. has declined to entertain jurisdiction over Wrenn's claim based on the theory that the district court has jurisdiction over Wrenn's complaint. Therefore, this court holds that it does have subject matter jurisdiction over plaintiff's complaint, and accordingly denies defendant's motion

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[2] 29 C.F.R. subsection 1613.215 (b) states that following the cancelation of a complaint by the E.E.O.C., a civil action may be filed in a United States district court pursuant to 29 C.F.R. subsection 1613.281.

to dismiss Wrenn's complaint.

Since this court has jurisdiction over plaintiff's complaint, it must determine whether the defendants are entitled to summary judgment on plaintiff's claim.

To briefly review the facts in this case, the defendant V.A.M.C. hired an individual other than Wrenn even though the plaintiff had applied and was qualified for this very position. Believing that he had been discriminated against on the basis of his race and/or age, the plaintiff filed a complaint with the E.E.O.C. In an attempt to settle this dispute, the V.A. offered the plaintiff what the Commission certified "full relief". This offer was rejected by Wrenn, and consequently the E.E.O.C. cancelled his administrative complaint pursuant to 29 C.F.R. subsection 1613.215. The defendants now seek dismissal of, or summary judgment on, Wrenn's civil complaint.

Wrenn argues that the defendant's motion should be denied for several reasons. He alleges

that (a) the offer by the defendants was not certified by the E.E.O.C. as "full relief"; (b) he was entitled to an award of a sum of money equal to the backpay he would have received from the date he would have been appointed to the position absent discrimination, until the date the defendants offered Wrenn the position; and (c) summary judgment would be inappropriate since he has not had a hearing with the E.E.O.C. None of these arguments are sound.

(a) The offer by the V.A. was certified "full relief".

Wrenn claims that the V.A.'s offer was not full relief because the offer was for a temporary position, and he claims that he had applied for a permanent job.

The advertisement in the Albany Times-Union for Clerk-Typists to which Wrenn responded states:

> **CLERK TYPIST**
> Immediate vacancies exist at the Albany VA Medical Center for 2 clerk typist positions.
>
> Applicants are required to type a minimum of 40 wpm.

Medical terminology preferred.

For further information contact:

V.A. Medical Center
113 Holland Ave., Albany
Personnel Office, Room 106B
(518) 462-3311, Ext 204

EOE

At the time the plaintiff submitted his application, Kara Jordan was the personnel assistant of the V.A.M.C. As its personnel assistant, Jordan was in charge of hiring persons for the aforesaid Clerk-Typist position. As Jordan's testimony indicates, all applicants who followed the instructions in the advertisement by calling the V.A.M.C. were notified that only temporary jobs were available for the Clerk-Typist position.[3]

Rather than call the V.A.M.C. before submitting his application, Wrenn chose to first submit his application which clearly indicated that

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[3] See Preliminary Affidavit of kara Jordan, 9/17/87, exhibit "E" in Defendants' Reply Memorandum.

he wanted a permanent position.[4] Thus, the fact that Wrenn thought that the clerk-typist job was a permanent position is irrelevant, because had the plaintiff called the V.A.M.C. as the advertisement directed, Wrenn would have discovered that the position he was applying for was only temporary.

Since the offer by the V.A. was certified as full relief by Gerald K. Hinch, General Counsel for the Office of Equal Opportunity on August 10, 1988, the plaintiff's contention that this offer was not properly certified as "full relief" is without merit.

(b) The plaintiff's demand for backpay.

Wrenn cites 29 C.F.R. subsection 1613.271 (b)(1) for the proposition that he was entitled to a sum equal to the backpay he would have received from the date he would have been appointed to the position of clerk-typist until the date he declined the V.A.'s offer of employment. This section

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[4] On his application, Wrenn noted that he would not be available for employment lasting less than twelve months.

provides, in pertinent part:

> (b) Remedial action involving an applicant. (1) When an agency, or the Commission, finds that an applicant for employment has been discriminated against, the agency shall offer the applicant the position the applicant would have occupied absent discrimination or...a substantially equivalent position...If the offer of employment is declined, the agency shall award the individual a sum equal to the backpay he would have received...from the date he would have been appointed until the date the offer was made....(emphasis added)

In the instant case, neither the V.A. nor the E.E.O.C. found that the V.A.M.C. had discriminated against Wrenn. Rather, in an attempt to resolve this dispute, the V.A. made Wrenn an offer of full relief, which would have placed Wrenn in exactly the same position he would have been in had he been offered the Clerk-Typist position in the first instance.

Certainly, the V.A.'s attempt to settle this dispute did not constitute an admission of discrimination on the defendant's part.

Since there has been no finding, by either the V.A. or the E.E.O.C., that the plaintiff has

been discriminated against, 29 C.F.R. subsection 1613.271 (b)(1) is inapplicable, and the defendants were not required to offer Wrenn a sum of money equal to the backpay he would have received from the date he would have been appointed to the position of clerk-typist until the date he declined the V.A.'s offer of employment.

(c) Plaintiff can not obtain a hearing with the E.E.O.C.

In the Commissions' ruling which dismissed plaintiff's request to reopen his E.E.O.C. complaint, the Commission stated that the it no longer has jurisdiction over plaintiff's claim, pursuant to 29 C.F.R. subsection 1613.283. This section states:

> The filing of a civil action by an employee or applicant involving a complaint filed under this subpart terminates processing of that complaint.

Wrenn, by commencing a civil action against the defendants, stripped the E.E.O.C of jurisdiction over his complaint, and the Commission can therefore

not provide the plaintiff with a hearing pursuant to 29 C.F.R. subsection 1613.218.

Conclusion

The V.A. offered Wrenn all he was entitled to in its offer of full relief on July 18, 1988. Wrenn, in declining this offer, made a counter-offer which included terms wholly unrelated to the position he had applied for on May 12, 1986. Since the defendants have offered Wrenn all he was entitled to, this court grant's the defendants' motion for summary judgment.

IT IS SO ORDERED.

DATED: February 13, 1990
Syracuse, NY

/s/Neal P. McCurn
Chief, U.S.
District Judge